Office Supreme Court, U.S.
FILED
DEC 1983
ALEXANDER L. STEVAS,
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No. 83-706

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

YVONNE G. TROUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents wrongly assert (Br. in Opp. 8) that the petition makes "an argument of fact, rather than of law." We do not ask for an opportunity to relitigate factual issues already decided by the district court. The errors of the courts below, and the importance of those errors, relate to legal principles, not to factual determinations. What we seek is to have the relevant evidence evaluated under proper legal principles.

As we stated in the petition (Pet. 8), the district court relied on a statistical analysis that was based, in critical part, on evidence that did not relate to employment decisions actionable under Title VII. Respondents totally ignore our essential submission: that the court of appeals' substantive rulings eliminated the legal basis for the district court's conclusion that respondents' regression analysis established

facts necessary to impose liability on petitioners. The district court's evaluation of the evidence cannot stand because, as the court of appeals correctly ruled, two critical legal premises of the district court's analysis of the evidence were incorrect: (1) that petitioners' pre-1972 actions, even if coupled with neutral employment actions since then, produced actionable, continuing discriminatory effects after 1972, and (2) that petitioners were responsible for initial placement decisions. See Pet. 11-12. Because the inclusion of evidence based on those two incorrect legal premises rendered the district court's evaluation of the evidence unreliable, petitioners are entitled to a remand to the district court to have all of the relevant evidence evaluated under correct legal principles that would eliminate the irrelevant evidence from consideration. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982); *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983).

On the current state of the record, it cannot be said that respondents have carried their burden of proof without reliance on the impermissible factors described above. Indeed, it is clear that the district court specifically accepted respondents' proof, and rejected petitioners', because of its mistaken view of the law (Pet. App. 46a-48a). For their argument that there was nevertheless sufficient evidence to establish post-1972 discrimination, respondents point to "separate salary regressions for those persons * * * hired after 1972" (Br. in Opp. 4). However, the district court specifically found those regressions to be "substantially less probative" than the regressions which included the legally

irrelevant components and stated that it "has not considered [the separate salary regressions] on an independent basis" (Pet. App. 45a, n.14).[1]

Respondents also err in asserting (Br. in Opp. 6) that petitioners stipulated that certain merit system promotion practices were not followed, and that this stipulation establishes actionable discrimination on the part of petitioners. Neither court below relied on the stipulations as a basis for imposing liability. As the district court stated (Pet. App. 42a, footnote omitted): "resolution [of the disputed issues] resolves primarily around the statistics submitted by the parties and the analysis of those statistics by the parties' experts".[2] In any event, there was no concession by petitioners that the stipulated acts and practices were unlawful in any way, much less that any departures from merit system selection procedures discriminated against women.

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[1]The district court had good reason for doubting the probative value of these regressions. While they purport to relate only to persons "hired" after 1972, the regressions, in fact, include data on persons *transferred* to NAVCOSSACT when NAVCOSSACT was merged with other organizations to form NARDAC. Each of these persons came to NAVCOSSACT at a grade level dictated by the prior employer's acts and practices. Moreover, petitioners presented regressions establishing that when salaries of persons actually hired after 1972 (as opposed to those transferred as well as hired) were evaluated there was no statistically significant difference between those of men and women. D. Ex. 204 at 4-6; D. Ex. 205; Tr. 1436-1437, 1505. In short, respondents' post-1972 regression interwines responsibility for initial placement decisions that the court of appeals held could not be placed on petitioners, with employment decisions for which petitioners are legally responsible.

[2]Similarly, the non-statistical evidence relied on by respondents (Br. in Opp. 5) was not found to be determinative of the findings of liability by the courts below and is not relevant to the issues presented by this petition.

Finally, respondents err in arguing (Br. in Opp. 14) that their regression analyses "do not imply any assumptions about the fairness of initial grade, initial salary or any pre-1972 condition of employment because these variables are *excluded*" (emphasis in original). Respondents' primary evidence, upon which the decisions below rest, was a multiple regression analysis that, as the district court recognized, did not distinguish between pre-Act and post-Act practices and failed to distinguish between initial placement and promotional decisions (Pet. App. 46a-48a). That analysis provided a snapshot of NAVCOSSACT/ NARDAC salaries at a specific time. Any given employee's salary included in the analysis is determined in part by his or her prior employment history, including initial placement and employment decisions made before 1972. Nothing in the multiple regression analysis excluded the effects of these initial placement and pre-1972 actions. See Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737, 746 (1980).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1983